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Nos. 97-1943, 97-1992 and 98-591

In The

Supreme Court of the United States

October Term, 1998

ALBERTSON'S INC.,

Petitioner,

v.

HALLIE KIRKINGBURG,

Respondent.

VAUGHN L. MURPHY,

Petitioner,

v.

UNITED PARCEL SERVICE,

Respondent.

KAREN AND KIMBERLY SUTTON,

Petitioners,

v.

UNITED AIRLINES, INC.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth And Tenth Circuits

BRIEF OF SENATORS HARKIN AND KENNEDY, REPRESENTATIVES HOYER AND OWENS AND FORMER SENATOR DOLE AS AMICI CURIAE IN SUPPORT OF RESPONDENT KIRKINGBURG AND PETITIONERS SUTTON AND MURPHY

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Reynolds v. Brock, 815 F.2d 571 (9th Cir. 1987) 7

School Board of Nassau County v. Arline, 480 U.S. 273 (1987)..... *passim*

Southeastern Community College v. Davis, 442 U.S. 397 (1984)..... 13

Sutton v. United Air Lines, Inc., 130 F.3d 893 (10th Cir. 1997) ..... *passim*

Taylor v. United States Postal Service, 946 F.2d 1214 (6th Cir. 1991)..... 27

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29 C.F.R.
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§ 1630, app. § 1630.2(j) para. 12 .....15, 28

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House Comm. On the Judiciary, H.R. Rep. No. 485 (III), 101st Cong., 2d Sess. at 28, 29, 33, 42, 50 (1990) [hereinafter House Report (III)] ..... *passim*

S. Rep. No. 872, 88th Cong., 2d Sess. at 23 (1964) ("The pledge of this Nation is to secure freedom for every individual" and that "that pledge will be furthered by the elimination of [discriminatory] practices") 6, 9, 12, 15, 19

Section 504 of the 1973 Rehabilitation Act, 29 U.S.C.
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Senate Comm. on Labor and Human Resources, S. Rep. No. 116, 101st Cong., 1st Sess., at 9-10 (1989) 5

Senate Report at 22, 31, 39, 62, House Comm. On Education and Labor, H.R. Rep. No. 985 (II), 101st Cong., 2d Sess. at 51, 52, 62, 72, 79, 80 (1990) [hereinafter House Report (II)] 9, 12, 13, 14, 16, 19

Title I, 42 U.S.C. § 12116 15

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MISCELLANEOUS

American Diabetes Association, *Medical Management of Type 1 Diabetes* 60 (3d. ed., American Diabetes Association. 1998) 10

Equal Employment Opportunity Commission, *EEOC Technical Assistance Manual* at II-11 22

Epilepsy Foundation of America, *Epilepsy: A Report to the Nation* (1999) 11

Robert L. Burgdorf, *"Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 Vill. L. Rev. 409 (1997) ..23, 25

Ruth Colker, *The Americans With Disabilities Act: A Windfall for Defendants*, 34 17

Orrin Devinsky, Antiepileptic Drug Therapy, in Guide to Understanding and Living with Epilepsy. F.A. Davis & Co., Philadelphia, 1994 12

TABLE OF AUTHORITIES – Continued

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Jonathon C. Drimmer, *Cripples, Overcomers and Civil Rights: Tracing the Evolution of Legislation and Social Policy for People With Disabilities*, 40 U.C.L.A. L. Rev. 1341 (1993) 16

R.S. Fisher, et al., A Large Community-Based Survey of Quality of Life and Concerns of People with Epilepsy: Part I, *Epilepsia* Vol. 39, Supp. 6 (1998) 11

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Frederick K. Goodwin M.D. & Kay Redfield Jamison, Ph.D., *Manic Depressive Illness* 597 (Oxford University Press 1990) 11

Richard S. Keefe & Phillip D. Harvey, *Understanding Schizophrenia* 437-440 (The Free Press 1994)..... 11

National Alliance for the Mentally Ill, *Understanding Manic Depression* (1997)..... 11

National Alliance for the Mentally Ill, *Understanding Schizophrenia* (1997)..... 11

N. Santilli, Selection and Discontinuation of Anti-epileptic Drugs, in *Managing Seizure Disorders: A Handbook for Health Care Professionals*, edited by N. Santilli, Lippincott-Raven Publishers, Philadelphia 1996 12

S. Schachter, Treatment of Seizures, in *The Comprehensive Evaluation and Treatment of Epilepsy: A Practical Guide*. Edited by Steven C. Schachter, and Donald L. Schomer, Academic Press, San Diego 1997 12

Fuller Torry, M.D., *Surviving Schizophrenia* 189 (3d ed., Harper Collins Books 1985)..... 11

INTEREST OF AMICI*

The following Senators and Congressmen were primary authors and sponsors of the Americans with Disabilities Act and have been leaders in shaping this nation's disability policy.

Former Senator Bob Dole, a war veteran with a disability, was a key proponent of securing equal opportunity for people with disabilities during his years in the Senate, including playing a leadership role in the development of the ADA.

Senator Tom Harkin was the chief sponsor and a principal author of the ADA. As Chair of the Subcommittee on Disability Policy of the Senate Committee on Labor and Human Resources, and floor manager, he was involved in all aspects of the passage of the ADA.

Congressman Steny Hoyer was the lead House co-sponsor of the ADA. He led the House passage of the legislation and was intimately involved in all aspects of its consideration.

Senator Edward Kennedy, a principal author of the ADA, was the Chair of the Senate Committee on Labor and Human Resources during its passage.

Congressman Major Owens was Chair of the Subcommittee on Select Education of the Committee of Education and Labor during the deliberations on the ADA and was involved in all deliberations in the House.

Amici, current and former members of Congress, file this brief on behalf of the petitioners in *Sutton v. United Air Lines, Inc.*, 130 F.3d 893 (10th Cir. 1997) and *Murphy v. United Parcel Service*, 141 F.3d 1185 (10th Cir. 1998) and the respondent in *Kirkingburg v. Albertson's, Inc.*, 143 F.3d 1228 (9th Cir. 1998) in order to address the issues raised about the proper analytical framework for deciding whether an individual is "disabled" for purposes of Americans with Disabilities

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* The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

Act (ADA) coverage.[1] *Amici* are deeply concerned by the growing trend in the lower courts to use what was intended as a broad statutory definition of disability to cut off exactly the types of claims the ADA was designed to address. Closing the door at the threshold coverage stage not only denies protection to millions of Americans that Congress sought to protect but also condones exactly the conduct Congress intended to eliminate.

Amici take no position in this brief on the issues raised about job qualifications. Rather, this brief focuses on the common issue in these cases, which is that individuals who are being denied employment because of their impairments are being barred from an opportunity to demonstrate their qualifications by being stripped of coverage under the ADA. The rationale established in these cases will have a profound impact on the future viability of the ADA for individuals with a wide variety of other medical conditions – including diabetes, epilepsy, mental illness, and cancer – that Congress clearly intended to be included under the ADA's definition of disability.

SUMMARY OF THE ARGUMENT

The fundamental purpose of the ADA is "to provide a comprehensive national mandate for the elimination of discrimination against individuals with disabilities" 42 U.S.C. § 12101(b)(1). This purpose has been eroded by restrictive interpretations of the threshold requirement in any ADA suit, that plaintiff be an "individual with a disability." Dismissals, often at the summary judgment stage, preclude plaintiffs who

[1] It is important to note that although the cases currently before the court arise in the employment context under Title I of the ADA, the definition of disability contained in 42 U.S.C. § 12102(2) applies to Title II (state and local governments) and Title III (public accommodations) as well. If the restrictive interpretations developed in the lower courts in Title I employment cases are sustained by this court, it will be difficult for any individual whose impairment is responsive to medication or other assistive device to bring an action under Titles II or III.

have been rejected because of their physical or mental impairments from ever having the opportunity to show that they are qualified for the job.

As this Court recently recognized in *Bragdon v. Abbott*, 118 S. Ct. 2196 (1998), the definition of disability in the ADA is patterned after the definition in the Rehabilitation Act of 1973, 29 U.S.C. § 706(8)(B) (1988 ed.) In enacting the ADA, Congress was well aware that the definition was broad and not limited to traditional disabilities. Congress was guided by this Court's decision in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), which recognized that the breadth of the definition reflected Congress' desire to address a variety of situations where a physical or mental impairment is used to foreclose participation in the community, including working. As the Court stated: "[t]he Act is carefully structured to replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments; the definition of [disability] is broad, but only those individuals who are both [disabled] and otherwise qualified are eligible for relief." *Arline* at 284-285.

The Tenth Circuit opinions in *Sutton* and *Murphy* unduly restrict the definition of disability by refusing to defer to consistent agency interpretations and legislative history which states that in evaluating whether an impairment substantially limits a major life activity, the impairment must be evaluated without regard to mitigating measures. Since the language of the statute is at least ambiguous, a court "may not substitute its own construction . . . for a reasonable [agency] interpretation." *Chevron, USA Inc. v. National Resource Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984).

Indeed, an employer who refuses to consider the mitigating measure when it rejects the plaintiff based on the underlying impairment should not be able to use the success of the mitigating measure to defeat ADA coverage. Moreover, the agencies' interpretation is more in tune with the actual nature of mitigating measures. For example, while epilepsy, diabetes and mental illness are subject to mitigation through medication, the relative degree of success varies not only from

person to person, but for any given individual it depends on a number of variables. The changing nature of the effectiveness of medicines and other assistive devices over time makes an "impairment with mitigation" rule unstable and inconsistent.

If this Court decides that mitigating measures should be taken into account for purposes of determining whether an impairment is actually "substantially limiting," then an alternative basis for coverage is the "regarded as" prong of the disability definition. 42 U.S.C. § 12102(2)(C). As this Court recognized in *Arline*, Congress intended to address exclusionary practices based on medical conditions by including in the definition of disability people whose impairments are not substantially limiting, but who nevertheless are substantially limited by the "negative reactions of others to the impairment." 480 U.S. at 283. The lower courts, as illustrated by the Tenth Circuit here, have effectively repealed the "regarded as" prong by requiring that plaintiffs be actually substantially limited in order to be regarded as such. Moreover, in the employment context, courts are routinely granting summary judgment on the grounds that rejection from a "single job" does not mean that the employer regarded the plaintiff as substantially limited in working. In so doing, the courts are creating burdens for plaintiffs which are often illogical and insurmountable. The proper approach is for the employer's rejection to be given its natural meaning, which is that the employer regards the plaintiff as unable to do the tasks involved in the type of job for which the plaintiff was rejected. In most cases, this will, at a minimum, raise a genuine issue of fact as to whether the employer regarded the plaintiff as substantially limited in working.

The overly restrictive interpretations given to the definition of disability have resulted in the dismissal of ADA claims for plaintiffs with a wide variety of disabilities that Congress explicitly intended to cover. Being "disabled" within the meaning of the ADA does not mean the plaintiff wins. The plaintiff must still show that he or she was discriminated against on the basis of disability and is qualified to perform the essential functions of the job. 42 U.S.C. § 12112; 42 U.S.C. § 12111. As this Court stated in *Arline*, 480 U.S. at

284, exclusion at the coverage stage leaves these individuals "vulnerable to discrimination on the basis of mythology . . . precisely the type of injury Congress sought to prevent."

ARGUMENT

I. THE DEFINITION OF DISABILITY IS BROAD IN ORDER TO ACHIEVE THE NON-DISCRIMINATION GOALS OF THE ADA.

During congressional hearings concerning the ADA, Congress learned that employers routinely used employment criteria based on physical and mental characteristics to deprive otherwise qualified individuals of the opportunity to work.[2] The Senate Report stated:

> The requirement that job criteria actually measure ability required by the job is a critical protection against discrimination based on disability. As was made strikingly clear during the hearings on the ADA, stereotypes and misconceptions about the abilities, or more correctly the inabilities, of persons with disabilities are still persuasive today.[3]

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[2] The findings and purposes section of the ADA, 42 U.S.C. § 12101(a)(5) (1990) cites "exclusionary qualification standards and criteria" as a type of discrimination continually faced by people with disabilities. *See* Senate Comm. on Labor and Human Resources, S. Rep No. 116, 101st Cong., 1st Sess., at 9-10 (1989) [hereinafter Senate Report] (citing testimony enumerating major categories of job discrimination faced by people with disabilities including: use of standards and criteria that have the effect of denying opportunities; refusal to hire based on presumptions, stereotypes and myths about job performance, safety, insurance costs, absenteeism and acceptance by coworkers; and use of application forms and other pre-employment inquiries that inquire about the existence of disability rather than about the ability to perform the essential functions of the job).

[3] *Id.* at 37.

Congress concluded that exclusion on the basis of physical or mental impairments was not only harmful to the self-sufficiency and dignity of the individual, but to society as a whole.[4] Just as Congress sought to eradicate policies that discriminated on the basis of race and sex when it enacted Title VII of the Civil Rights Act of 1964,[5] so too did Congress seek to remove the vestiges of exclusionary, irrational policies based on physical or mental impairments when it enacted the ADA.[6]

Congress thus defined the class to be protected under the ADA broadly, defining an "individual with a disability" as a person who (a) has a physical or mental impairment that substantially limits one or more major life activities, (b) has a record of such an impairment, or (c) is regarded as having such an impairment. 42 U.S.C. § 12102(2). By passing through the initial threshold requirement of establishing that he or she has a disability under the ADA, however, a plaintiff has only satisfied one part of a three-part *prima facie* case

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[4] 42 U.S.C. § 12101(a)(9) ("the continuing existence of unfair and unchanging discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis . . . and costs the United States billions of dollars in unnecessary expenses from dependency and nonproductivity"); Senate Report at 16-17 ("The Committee also heard testimony and reviewed reports concluding that discrimination results in dependency on social welfare programs that cost the taxpayers unnecessary billions of dollars each year."); 136 Cong. Rec. S10,713 (1990) (statement of Sen. Harkin quoting Attorney General Richard Thornburgh) ("We must recognize that passing comprehensive civil rights legislation protecting persons with disabilities will have direct and tangible benefits for our country").

[5] 42 U.S.C. 2000e-2 through -17 (1994); S. Rep. No. 872, 88th Cong., 2d Sess. at 23 (1964) ("The pledge of this Nation is to secure freedom for every individual" and "that pledge will be furthered by the elimination of [discriminatory] practices").

[6] Congress sought to address pervasive discrimination based on "stereotypic assumptions," 42 U.S.C. § 12101(a)(7) through a " . . . comprehensive national mandate for the elimination of discrimination against individuals with disabilities," 42 U.S.C. § 12101(b)(1).

under the ADA. The plaintiff must *also* show that he or she is qualified to perform the essential functions of the job, and that he or she was excluded from employment because of his or her disability.[7] The proper approach to this three-part *prima facie* case is to broadly interpret the definition of disability, so that a fact-specific inquiry into the individual's qualifications can be pursued.

As the Supreme Court stated in *Arline*, 480 U.S. at 284-285 (1987), about the virtually identical definition of disability under the Rehabilitation Act, "[t]he Act is carefully structured to replace . . . reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments: the definition of handicapped individuals is broad, but only those individuals who are both handicapped and otherwise qualified are eligible for relief."[8]

The unduly narrow interpretation of the definition of disability illustrated by the Tenth Circuit opinions in *Sutton* and *Murphy* perpetuates a Catch-22 that was not contemplated

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[7] *See e.g., Lawrence v. National Westminster Bank of N.J.*, 98 F.3d 61, 68 (3d. Cir. 1996); *Olson v. General Elec. Astrospace*, 101 F.3d 947, 951 (3d. Cir. 1996); *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 882 (6th Cir. 1996).

[8] As this Court stated in *Bragdon v. Abbott*, 118 S. Ct. 2196, 2201 (1998), "[t]he ADA's definition of disability is drawn almost verbatim from the definition of "handicapped individual" included in the Rehabilitation Act of 1973, 29 U.S.C. § 706(8)(B) (1988 ed.) . . . Congress' repetition of a well-established term carried the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations." Section 504 case law consistently recognized individuals with impairments subject to mitigation or who were asymptomatic as covered by Section 504. *Reynolds v. Brock*, 815 F.2d 571 (9th Cir. 1987) (epilepsy); *Mantolete v. Bolger*, 767 F.2d 1416 (9th Cir. 1985) (seizure disorder); *Davis v. Meese*, 692 F. Supp. 505 (E.D. Pa. 1988), *aff'd*, 865 F.2d 592 (3rd Cir. 1989), (insulin dependent diabetes); *Kohl v. Woodhaven Learning Center*, 865 F.2d 930 (8th Cir. 1989), (asymptomatic hepatitis B). *See also, Bradgon* at 2208 (listing section 504 cases covering individuals with asymptomatic HIV infection).

by Congress. Defendants are excluding individuals because of physical or mental impairments and then claiming that the rejected applicant or employee is not covered by the ADA because he or she is not disabled. In other words, the plaintiff is too disabled to do the job, but not disabled enough to be protected by the ADA.

For example, UPS argued that Mr. Murphy should not be able to claim that he was both substantially limited and qualified.[9] The Tenth Circuit affirmed the district court's view that the plaintiff should not "have it both ways" or withstand a motion for summary judgment based on "such inconsistent positions."[10] This is where the Tenth Circuit gets it exactly wrong. It was Congress' intent not to let *employers* "have it both ways". It was Congress' intent to disallow *employers* from obtaining summary judgment based on these "inconsistent positions" that motivated Congress to enact an expansive definition of disability under the ADA.

Instead of allowing the cases to proceed on the merits of whether an individual is qualified, the courts are fusing these two distinct inquiries of (1) whether plaintiff is a "person with a disability" and (2) whether the plaintiff is qualified to do the job, and penalizing plaintiffs for taking what is characterized as "inconsistent positions." The whole premise of the ADA is that individuals can be both "disabled" and able at the same time. The three prong definition of disability is not meant to be a legalistic trap but instead was drafted to convey the wide range of situations where impairment status is the subject of discriminatory action. This Court's understanding and explanation of this Congressional intent in *Arline* has been virtually ignored by the lower courts.

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[9] The District Court stated: "To demonstrate that he is disabled, Murphy sets forth several of the serious consequences which can result from his high blood pressure. Then in subsequent section of his brief, Murphy, in an effort to demonstrate that he is qualified for the position at UPS, essentially argues that his high blood pressure posed no threat or obstacle to the performance of his duties as mechanic. *Murphy*, 946 F. Supp. 872, 878 (1996).

[10] *Id.* at 878-879.

There can be no doubt that Congress did not intend medical and technological advancements which mitigate the effect of impairments enabling independence and self sufficiency to strip individuals with physical or mental conditions of protection under the first prong of the definition of disability. Moreover, Congress was not only concerned with protecting people with actual disabilities but also with prohibiting employers from using arbitrary medical criteria as the basis for excluding individuals with physical or mental impairments. The "regarded as" prong of the ADA was enacted so that employers cannot "have it both ways."

II. CONGRESS MADE CLEAR ITS INTENT THAT THE FIRST PRONG OF THE DEFINITION OF DISABILITY BE DETERMINED WITHOUT CONSIDERATION OF MITIGATING MEASURES.

The only plausible interpretation of the plain language of the ADA, the legislative history and agency interpretations is that coverage under the first prong of the definition of disability must be decided without reference to mitigating factors.

A. The Plain Language.

The first prong of the statutory definition of disability states that "[t]he term disability" means, with respect to an individual – a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2). The purpose of the phrase "substantially limits one or more major life activities" is to distinguish minor, trivial impairments, from those that have a significant impact on a person's life.[11] By prohibiting discrimination against people who fall within the first prong of the definition of disability, Congress intended to protect individuals with significant impairments from being discriminated against on the basis of those impairments.

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[11] As stated in the Senate Report, "Persons with minor, trivial impairments, such as a simple infected finger, are not impaired in a major life activity." Senate Report at 23; House Report (II) at 52.

The plain language of the statute simply looks at whether the impairment substantially limits a major life activity. Requiring a court to look at the impairment in its mitigated state (*i.e.*, after the individual has taken medication or used a prosthetic device) would undermine the purpose of the first prong, which is to prohibit discrimination on the basis of the impairment itself. In *Bragdon*, Justice Ginsburg stated that "[n]o rational legislator . . . would require nondiscrimination once symptoms become visible but permit discrimination where the disease, though present, is not yet visible." *Bragdon*, 118 S. Ct. at 2214. It would make just as little sense to prohibit discrimination on the basis of an impairment where the impairment is not ameliorated by mitigating measures, but to permit discrimination on the basis of the very same impairment simply because the individual with the impairment is taking medication or using a prosthetic device.

A rule which relies on mitigating measures is also problematic from a practical point of view. While there have been great strides in medications to help mitigate the effects of a variety of disabilities, factoring in mitigating measures adds often unpredictable and ever changing variables. Most people with conditions that rely on medication are constantly readjusting their doses and prescriptions, with more or less success. If the "disability" determination was contingent on the success or failure of mitigating measures, someone could be covered by the ADA one month and not the next.

For example, insulin, food, and exercise are mitigating measures persons with diabetes can use to achieve health and independence.[12] However, even the most stringent awareness and the most diligent balancing of these factors cannot eliminate the inherent limitations of diabetes.[13] Blood sugar levels, and, therefore, insulin needs, unpredictably respond to external forces such as stress, allergies, and illness.[14] While one

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[12] American Diabetes Association, *Medical Management of Type 1 Diabetes*, 60 (3d ed. 1998).

[13] *Id.* at 60-61, 71-72.

[14] *Id.* at 73, 77-79, 82.

may know how much insulin to administer to maintain a healthy blood sugar range in the normal course of a normal day, one cannot know how much insulin to give to ameliorate the effects of uncontrollable external forces. *Id.* at 61, 71-72, 76.

Like diabetes, mental illnesses fluctuate in severity over time.[15] Moreover, medications like Lithium for bipolar disorder and Risperdol for schizophrenia help control the most severe symptoms of these disorders, but they do not cure them.[16] In fact, it is very common for people with bipolar disorder to remain stable on Lithium for extended periods of time, only to deteriorate and require intensive interventions to stabilize their Lithium levels.[17] Moreover, psychiatric medications, particularly the more powerful psychotropics, have strong side effects that, in some instances, can be debilitating in and of themselves.[18]

Likewise, while the majority of people with epilepsy have their seizures controlled through medications,[19] there are few who can maintain complete control at all times. Approximately fifty percent of the 2.3 million people with epilepsy achieve good control through current therapies.[20] Another 30

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[15] Fuller Torry, M.D., *Surviving Schizophrenia*, 189 (3rd ed. 1985), ("Both schizophrenia and diabetes have relapses and remissions in a course which often lasts over many years, and both can be well controlled, but not cured, by drugs").

[16] National Alliance for the Mentally Ill, *Understanding Manic Depression* (1997); National Alliance for the Mentally Ill, *Understanding Schizophrenia* (1997).

[17] Frederick K. Goodwin, M.D. & Kay Redfield Jamison, Ph.D., *Manic Depresssive Illness* 597 (Oxford University Press 1990).

[18] Richard S. Keefe & Philip D. Harvey, *Understanding Schizophrenia* 437-440 (The Free Press 1994).

[19] Epilepsy Foundation of America, *Epilepsy: A Report to the Nation* (1999).

[20] R.S. Fisher, et al., A Large Community-Based Survey of Quality of Life and Concerns of People with Epilepsy: Part 1, *Epilepsia* Vol. 39, Supp. 6 (1998).

percent achieve partial control, and the rest have seizures that cannot be controlled through any current treatment.[21] There may be a period of weeks, months, or even years, where seizures are well controlled, and then seizures may recur.[22]

Breakthrough seizures, even among people on medications, can occur for any number of reasons, but commonly include illness,[23] lack of sleep,[24] hormonal or metabolic changes,[25] and changes in medications.[26] Moreover, anti-seizure medication may also cause side effects that have varying degrees of impact on individuals' daily lives.[27] Because of side effects, people with epilepsy struggle with finding the right medication, in the smallest possible dose, to maintain seizure control, while obtaining optimal functioning.[28]

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[21] *Id.*

[22] *Id.*

[23] N. Santilli, Selection and Discontinuation of Antiepileptic Drugs, in *Managing Seizure Disorders: A Handbook for Health Care Professionals*, edited by N. Santilli, Lippincott-Raven Publishers, Philadelphia 1996.

[24] Schachter, S. Treatment of Seizures, in *The Comprehensive Evaluation and Treatment of Epilepsy: A Practical Guide*. Edited by Steven C. Schachter, and Donald L. Schomer, Academic Press, San Diego 1997.

[25] Herzog AG, Klein P., Ransil BJ, Three patterns of catamenial epilepsy, *Epilepsia*, 1997;38:1082-1088.

[26] Supra n.21.

[27] *Id.*

[28] Devinsky, Orrin, Antiepileptic Drug Therapy, in Guide to Understanding and Living with Epilepsy. F.A. Davis & Co., Philadelphia, 1994.

Epilepsy, diabetes, and mental illness are repeatedly referenced in the legislative history as conditions which Congress intended to cover in the ADA. (epilepsy) Senate Report at 22, 31, 39, 62, House Comm. On Education and Labor, H.R. Rep. No. 985 (II), 101st Cong., 2d Sess. at 51, 52, 62, 72, 79, 80 (1990) [hereinafter House Report (II)], House Comm. On the Judiciary, H.R. Rep. No. 485 (III), 101st Cong., 2d Sess. at 28, 29, 33, 42, 50 (1990) [hereinafter House Report (III)]; (diabetes) Senate Report at

Just as an individual could be disabled one month and not the next, two individuals with the exact same impairment could be "disabled" or not, depending on, among other things, their level of responsibility and commitment to a medical regimen and access to good medical care. Ironically, the more disciplined individual would be unable to invoke ADA protection if discriminated against based on the underlying impairment, while the less disciplined counterpart could invoke the ADA's protections. This simply does not make sense.

The next logical step in this line of reasoning could even be that in determining coverage under the ADA, courts would have to inquire whether the effects of the impairment could be controlled if the individual was more vigilant, had a better doctor, was better educated about the consequences of failing to follow a medical regimen, etc. There is no natural stopping point in the proposition that mitigating measures should be considered in determining first prong coverage. Never would this Court have anticipated that when it stated in *Southeastern Community College v. Davis*, 442 U.S. 397, 412 (1984) that "technological advances can be expected to . . . qualify [people with disabilities] for . . . employment," that those same technological advances would be used to strip plaintiffs of coverage under the ADA.[29]

B. Given that the Plain Language is At Least Ambiguous, The Court Should Defer to Explicit Legislative History and Authoritative Agency Interpretations.

When drafting the ADA, Congress explicitly considered the issue of mitigating measures, and consistent with the

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22, House Report (II) at 51-52, House Report (III) at 42; (mental illness) Senate Report at 39, 62, House Report (II) at 72, 79, House Report (III) at 28.

[29] Like *Arline*, *Southeastern* interpreted the ADA's predecessor statute, Section 504 of the 1973 Rehabilitation Act, 29 U.S.C. § 794 (1988 ed.).

intent that coverage be broad, concluded that mitigation should not be considered in determining first prong coverage.[30] For instance, the House Committee on Education and Labor declared that:

> Whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids. For example, a person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.
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> House Report (II) at 52.

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[30] In addition to the authoritative Committee Reports discussed below, there is also ample evidence in the legislative record that Congress intended individuals who took medicine to ameliorate the effects of impairments to be covered by the ADA. *See* 135 Cong. Rec. S10765, S10766 (Sept. 7, 1989) (statement of Senator Harkin):

> [I]f the disability would affect the performance of that person's job . . . then the employer could say this person was not qualified. If, however, the disability in question, whether schizophrenia, manic-depressive, or whatever it might be, is, let us say, controlled by drugs, the person is under a doctor's care, and the person is qualified for the job . . . [then] the employee would be able to go to the EEOC and file a complaint . . . .

See also Statement of Senator Domenici, *Id.* at 10779.

> [T]here may have been a time in history when if you had diabetes somebody asked you, do you have diabetes and they could have said to you, we cannot hire you. Certainly that is not the case today. Certainly you can have a disease as grave as that and fit more jobs. You are either in the process of being maintained, or we are coming close to finding a cure, or your disability is sporadic.

Likewise, the House Judiciary Committee Report and the Senate Report state that the impairment "should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in a less-than-substantial limitation." House Report (III) at 28, Senate Report at 23.[31]

The agencies charged with interpreting and implementing the ADA appropriately incorporated this legislative history in directing that first prong coverage be decided without regard to mitigating measures. As this Court stated in *Bragdon*, with regard to interpretations by the Department of Justice, "[a]s the agency directed by Congress to issue implementing regulations, *see* U.S.C. § 12186(b) . . . and enforce Title III in court, the Department's views are entitled to deference." 118 S. Ct. at 2209. The same can be said of the EEOC, which has been charged with the obligation to issue regulations implementing Title I, 42 U.S.C. § 12116.

Both the DOJ and EEOC interpret the first prong of the definition as requiring a determination of substantial limitation to be made without regard to mitigating measures such as medicines, or assistance, or prosthetic devices. 29 C.F.R. pt. 1630, app. § 1630.2(j) (1999); 28 C.F.R. pt. 35, app. A § 35.104; pt. 36, app. B § 36.104 (1999). Given that the agency interpretations are not inconsistent with the plain meaning of the statute and are a reasonable interpretation, considering the uncertainties of mitigation, this Court should be guided by the admonition in *Chevron, U.S.A., Inc. v.*

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[31] Much has been made of the fact the Senate Report uses the example of individuals with controlled diabetes or epilepsy to illustrate third prong "regarded as" coverage. *See* discussion of "regarded as," *infra*. The Senate Report example only serves to underscore Congress' intent to cover such individuals. First, a person with diabetes or epilepsy that is controlled with medication or diet may not be substantially limited even without such measures. Second, and most importantly, the definition of disability is fluid, so that the example can be seen as either first prong if the effects of medication are not considered or third prong if they are. All of the contortions about the appropriate prong are unnecessary. What matters is that the individual is covered by the ADA, as Congress clearly intended.

National Resource Defense Council, Inc., 467 U.S. 837, 843-44 (1984):

> The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, explicitly or implicitly by Congress . . . [and] a court may not substitute its own construction . . . for a reasonable [agency] interpretation . . . " (quoting *Morton v. Ruiz*, 415 U.S. 119, 231 (1974)).

III. THE "REGARDED AS" PRONG OF THE DEFINITION OF DISABILITY IS INTENDED TO ADDRESS THE SUBSTANTIALLY LIMITING IMPACT OF NEGATIVE REACTIONS TO IMPAIRMENTS THAT ARE NOT OTHERWISE SUBSTANTIALLY LIMITING.

If this Court decides that substantial limitation must be decided after consideration of mitigating measures, then the plaintiffs should be covered under the "regarded as" prong of the definition of disability. 42 U.S.C. § 12102(2). The "regarded as" prong reflects the "civil rights" approach to disability discrimination, recognizing that problems faced by people with disabilities are often not inherent to the medical condition itself, but are rather the product of ignorance and prejudice.[32] This was perfectly understood by this Court in *Arline*.[33]

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[32] As Senator Weicker testified, "people with disabilities spend a lifetime overcoming not what God wrought, but what man imposed by custom and law." 136 Cong. Rec. S9684-03, *S9698 (1990). *See*, Jonathon C. Drimmer, *Cripples, Overcomers and Civil Rights; Tracing the Evolution of Legislation and Social Policy for People With Disabilities*, 40 U.C.L.A. L.Rev. 1341 (1993).

[33] Congress adopted the Court's interpretation of the definition of disability in the ADA. House Report (II) at 53; House Report (III) at 305.

> To combat the effects of erroneous but nevertheless prevalent perceptions about the handicapped, Congress expanded the definition of "handicapped individual" so as to preclude discrimination against "[a] person who has a record of, or is regarded as having, an impairment [but who] may at present have no actual incapacity at all." *Arline* at 279. . . .
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> . . . .
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> . . . . By amending the definition . . . to include not only those who are actually physically impaired, but also those who are regarded as impaired, and who as a result are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment. *Id.* at 284.

The entire purpose of the third prong is to provide a vehicle for examining exclusionary practices and to provide recognition that these exclusionary practices constitute substantial limitations in the lives of people with a wide variety of medical conditions. As the Supreme Court stated in *Arline*, "the basic purpose of [the statute] . . . is to ensure that [disabled] individuals are not denied jobs or other benefits because of the prejudicial attitudes or ignorance of others." *Id.* at 284.[34] Instead of giving credence to the breadth of the third prong, courts are creating burdens of proof for plaintiffs which are often illogical and insurmountable. Most troubling is the overuse of summary judgment to cut off ADA claims at the threshold coverage stage.[35]

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[34] In *Arline*, the Court quoted an *amicus* brief of the Epilepsy Foundation of America for the proposition that "[a] review of the history of epilepsy provides a salient example that fear rather than the handicap itself is the major impetus for discrimination against persons with handicaps." 480 U.S. at 285 n.13.

[35] *See*, Ruth Colker, *The Americans With Disabilities Act: A Windfall for Defendents*, 34 Harvard Civil Rights – Civil Liberties Law Review 99,

A. Congress and the Enforcing Agencies Adopted Long Standing Agency Interpretations of the "Regarded As" Prong of the Definition of Disability.

Congress patterned the ADA's "regarded as" prong on regulations implementing Section 504 of the Rehabilitation Act of 1973. *See Bragdon*, at 2202 (noting that Congress adopted previous regulatory interpretations of Section 504 when it enacted the ADA). As the House Judiciary Report explains,

> The ADA uses the same "regarded as" test set forth in the regulations implementing Section 504 of the Rehabilitation Act. Those regulations provide:
>
> (iv) "Is regarded as having an impairment" means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment.

House Report (III) at 29 citing 45 C.F.R. 84.3(j)(2)(iv).

Congress explicitly relied on the rationale articulated by this Court in *Arline* for an understanding of the meaning and scope of the "regarded as" prong.

> The rationale for this third test, as used in the Rehabilitation Act of 1973, was articulated by the Supreme Court in *School Board of Nassau County v. Arline*. [480 U.S. 273 (1987).] The Court noted that although an individual may have an impairment that does not in fact substantially limit a major life activity, the reaction of others may prove just as

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110 (1999) (courts have misused the summary judgment rules to the disservice of plaintiffs in ADA employment cases).

> disabling. "Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." 480 U.S. at 283.

Senate Report at 23; House Report (II) at 53; House Report (III) at 30.

The Section 504 regulation was adopted by both the EEOC and the Department of Justice in their ADA regulations. 29 C.F.R. § 1630.2; 28 C.F.R. § 35.104. The interpretive guidance to the EEOC and DOJ regulations tracks the committee reports. 29 C.F.R. pt. 1630; app. § 1630.2; 28 pt. 35, app. A § 35.104 pt. 36, app. B § 36.104, respectively.

Accordingly, the "regarded as" prong is (1) intended to cover individuals who do not satisfy the requirements of the first two prongs of the definition of disability under the ADA, and (2) is meant to acknowledge that the negative reactions of others can be just as "substantially limiting" as the impairment itself. In other words, the third prong is intended to address societal barriers to full participation based on physical or mental impairments.

Courts, however, have had trouble reconciling the label "disabled" with an individual who is functioning well enough to work and take part in community events. Yet, this is exactly what Congress intended. As Judge Posner explained,

> Disability is broadly defined. It includes not only "a physical or mental impairment that substantially limits one or more of the major life activities of [the disabled] individual," but also the state of 'being regarded as having such an impairment.' The latter definition, although at first glance peculiar, actually makes a better fit with the elaborate preamble to the Act, in which people who have physical or mental impairments are compared to victims of racial and other invidious discrimination. Many such impairments are not in fact disabling but are believed to be so, and the people having them may be denied

> employment or otherwise shunned as a consequence. Such people, objectively capable of performing as well as the unimpaired, are analogous to capable workers discriminated against because of their skin color or some other vocationally irrelevant characteristic.

Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 541 (7th Cir. 1995). It is necessary to provide an analytical framework for enforcing the "regarded as" prong which gives effect to Congress' purpose.

B. The Proper Analytical Framework.

It is useful to remember that the definition of disability is generic to the ADA, not attached to the specific provisions of any one Title. Therefore, it is necessary to develop an analytical framework that will work for all the Titles of the statute. It is helpful to first look at Title III, which covers public accommodations, because in the employment context the analysis often gets muddled and confused by issues related to qualifications for the job.

Under Title III, if a bakery refused service to an individual with facial scars, the bakery would be regarding the individual as disabled. It would not matter if there were other bakeries that would serve the person, or whether the baker thought that eating bakery goods was a major life activity. The prejudice of the baker is the limitation the third prong is meant to address. If the individual can establish that the bakery refused to serve the individual because of his facial scars, that would be sufficient to establish a *prima facie* case of discrimination under the third prong.[36] Cf. House Report (III) at 30. ("For example, severe burn victims often face discrimination in employment and participation in community

[36] The Department of Justice, in its section-by-section analysis to its regulations implementing Title III, adopts the view that a rejection based on disability by a public accommodation invokes the third prong of the definition of disability. The Department of Justice states:

> which results in substantial limitation of major life activities.")

The question raised by *Sutton*, *Murphy*, and *Kirkingburg*, is how the third prong analysis should work in a Title I case. The legislative history indicates that when an applicant or employee is rejected from a job because of the individual's physical or mental impairment, there is at least a factual question as to whether the employer regarded the individual as being substantially limited in a major life activity, including working. The Senate Report gives as an example of individuals covered by the third prong "people who are rejected for a particular job for which they apply because of findings of a back abnormality on an x-ray."[37]

The Judiciary Report confronts the issue directly, stating:

> Thus, a person who is rejected from a job because of myths, fears, and stereotypes associated with disabilities would be covered under this third test, whether or not the employer's perception was shared by others in the field and whether or not the person's physical or mental condition would be considered a disability under the first or second part of the definition.[38]

To underscore Congress' broad interpretation of coverage, the Judiciary Report states:

> It is not necessary for the covered entity to articulate one of these concerns. In the employment context, if a person is disqualified on a basis of an actual or perceived physical or mental condition, and the employer can articulate no legitimate job-related reason for the rejection, a perceived concern about employing persons with disabilities could be inferred and the plaintiff qualifies for coverage under the "regarded as" test.[39]

[37] Senate Report at 24.

[38] House Report (III) at 30.

[39] House Report (III) at 30-31.

Using this analysis, the EEOC cites concerns related to productivity, safety, insurance, liability, attendance, cost, accommodation, accessibility, worker's compensation costs or acceptance by co-workers and customers as examples of stereotypes, fears or misconceptions about disabilities.[40] The EEOC concludes that if an employer makes an adverse employment decision based on beliefs or fears that a person's perceived disability will cause problems in any of these areas, and the employer cannot show a legitimate nondiscriminatory reason for the action, the individual would be covered under the third prong of the definition.[41]

Too often, however, in the employment context, the lower courts are granting summary judgment to defendants, with the rationale that rejection from a "single job" is not enough to show that the employer regarded the rejected applicant or employee as substantially limited in the major life activity of working, or in any other major life activity.[42] At

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[40] 29 C.F.R. pt. 1630, app. §1630.2(1) (1999); EEOC *Technical Assistance Manual* at II-11.

[41] *Id.*

[42] Fortunately, some of the circuit courts are beginning to vacate such dismissals, recognizing that in most instances the issue of whether the employer regarded the plaintiff to have a disability is a question of fact. *See Johnson v. American Chamber of Commerce Publishers, Inc.*, 108 F.3d 818, 819-20 (7th Cir. 1997) (leaving issue of whether defendant was regarded as having disability for lower court on remand); *Best v. Shell Oil*, 107 F.3d 544, 549 (7th Cir. 1997) ("[A] trier of fact could find that [defendant] perceived [plaintiff] as having a disability that prevented him from working"); *Harris v. H.W. Contracting Co.*, 102 F.3d 516, 524 (11th Cir. 1996) (finding question of fact still exists with respect to "regarded as" prong); *Olson v. General Elec. Astrospace*, 101 F.3d 947, 955 (3d Cir. 1996) ("[I]t is clear that a reasonable fact-finder could infer that [defendant] perceived [plaintiff] to be disabled"); *Holihan v. Lucky Stores*, 87 F.3d 362, 366-67 (9th Cir. 1996) (holding that lower court erred in granting judgment as matter of law because the evidence could support finding that defendant regarded plaintiff as having disability); *Katz v. City Metal Co.*, 87 F.3d 26, 33-34 (1st Cir. 1996) (finding evidence created

least part of the problem appears to stem from a misapplication of the EEOC's regulations, which define substantially limited in the major life activity of working as

> "significantly restricted in the ability to perform either a class of jobs, or a broad range of jobs in various classes as compared to the average person having comparable training, skill, and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. § 1630.2(j)(3)(i).

Hence, in a case under the *first* prong of the definition of disability, the plaintiff must allege that his/her impairment actually restricts him/her from performing a "class of jobs."[43]

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genuine issue of material fact with respect to "regarded as" prong); *See also EEOC v. Joslyn Mfg. Co.*, No. 95C 4956, 1996 WL 400037, at *7 (N.D. Ill. July 15, 1996) ("[I]n order to survive summary judgment, the [plaintiff] only need raise a genuine issue of facts as to whether [the plaintiff's] perceived impairment substantially limited his ability to work, not actually prove as much.").

[43] The "single job" exception has also been interpreted too broadly by lower courts, to defeat first prong coverage. *See* Robert L. Burgdorf, *"Substantially Limited" Protection from Disability Discrimination: The Special Treatment; Model and Misconstructions of the Definition of Disability*, 42 Vill. L. Rev. 409 (1997).

> The exclusion-from-one-job-is-not-enough formula has resulted in, or contributed to, the dismissal of ADA or section 504 of the Rehabilitation Act claims by plaintiffs with, among others, the following kinds of impairments: replacement of hips and shoulders (as a result of a vascular necrosis); diabetes; cancer; laryngectomy (removal of larynx); hemophilia; heart attack; absence of one eye; degenerative hip disease resulting in a limp; permanent severe limitations in use of the right arm and shoulder; various serious back injuries; depression and paranoia; a six-inch scar on the face resulting in supervisors calling the employee "scarface; 'bilateral carpal tunnel syndrome;' " asthma; asbestosis; HIV infection; traumatic brain injury resulting in vision limitations, memory deficiencies, problems with verbal fluency, problems

However, under the third prong, a plaintiff is alleging that he/she *can* perform the class of jobs represented by the job in question. Therefore, the plaintiff will not be able to demonstrate, nor would he or she have any interest in demonstrating, that he or she is precluded from the class of jobs involved. In most cases, the only evidence which will be available to plaintiff is the rejection by the defendant. It is not the rejection per se which gives rise to the "regarded as" claim, but the natural and ordinary implication of such a rejection. Usually, if an employer rejects an individual from a job because of the individual's impairment, it means the employer thinks the individual's impairment precludes the individual from doing the types of tasks the job requires. Therefore, in most cases, a rejection based on a medical condition raises, at a minimum, a material issue of fact as to whether the employer "regarded" the individual as "disabled" within the meaning of the ADA.

Summary judgment on the definition issue is inappropriate, except in cases where there is no conceivable set of facts from which a trier of fact could conclude that plaintiff was "regarded as" substantially limited in working or in any other major life activity. Self serving statements by a defendant that it did not regard the plaintiff as so limited cannot be the basis of summary judgment when the natural and predictable implication of the adverse treatment is otherwise.

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abstracting and motor deficits; and stroke resulting in the loss of use of the left hand, arm and leg. (footnotes omitted)

For case cites *see id.* at 539-541 nn.643-661.

C. Analytical Problems with the Lower Court Decisions, as Illustrated by the Tenth Circuit Opinions.

The mistakes of the lower courts are illustrated by the Tenth Circuit opinion in *Sutton*,[44] where the court:

1. Required, in essence, that plaintiffs be actually substantially limited (1st prong) in order to establish a "regarded as" case; and
2. Required that the plaintiffs demonstrate that the employer regarded them to be disqualified from similar jobs by other employers.

Both of these requirements, often combined, constitute insurmountable obstacles for plaintiffs.[45] Since an employer is only concerned with the particular job it is offering, it is not likely to be thinking about other jobs the impaired individual could or could not obtain and certainly is not thinking about how the plaintiff's impairment affects other activities besides working. The only way to give meaning to the "regarded as" prong is to interpret the rejection from the job in question to signify the employer's view of the plaintiff's ability to perform the class of jobs to which the job in question belongs.

Yet, employers are being allowed to defend suits under the ADA by proving that other employers do not utilize the same discriminatory criteria as that employed by the defendant and that, therefore, the discriminatory criteria does not constitute a substantial barrier to employment.[46] In other

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[44] The *Sutton* decision provides a more thorough analysis of the "regarded as" prong than *Murphy*.

[45] *See e.g., Welsh v. City of Tulsa*, 977 F.2d 1415, 1419 (10th Cir. 1992) (rejecting plaintiff's "regarded as" claim because he was not substantially limited in major life activity).

[46] *See Burgdorf* at 441, 456, n.234; *see e.g., Bridges v. City of Bossier*, 92 F.3d 329 (5th Cir. 1996). (In a case involving rejection as a fire fighter because of hemophilia, where the court refused to consider the policy of the city to require all EMT and paramedic positions to meet firefighting

words, the more arbitrary and prejudicial the physical or mental criteria, the more likely the employer will be able to escape review under the ADA.[47] This argument would be untenable in other areas of civil rights law, where proof of other employers' nondiscriminatory job criteria would be used as evidence of the defendant's discrimination.

The Tenth Circuit opinion in *Sutton* illustrates how both the infusing of first prong analysis in "regarded as" cases and requiring a plaintiff to demonstrate the employer's perception beyond the natural implications of the rejection itself undermines the "regarded as" prong. In determining whether United "regarded" plaintiffs as unable to do a class of jobs, the court immediately shifted its inquiry to the first prong analysis of whether plaintiffs' impairment actually substantially limited their employment in a "class of jobs". *Sutton* at 903-904. The Court then concluded that if the plaintiffs are not substantially limited in working in actuality, they also cannot be found to have been regarded as substantially limited. This judicial construction effectively repeals the third prong of the definition.

The court also improperly applies the "single job" exception in the EEOC regulations defining "substantially limited in working" to the "regarded as" analysis. Although the Tenth Circuit accepts plaintiffs' allegations that United rejected

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standards in consideration of whether plaintiff was excluded from a "class of jobs" because there was no proof that other employers did the same thing.)

[47] The case which gave rise to the "class of jobs" analysis recognized that in "evaluating whether there is a substantial handicap to employment, it must be assumed that all employers offering the same job or similar jobs would use the same requirement or screening process," *E.E. Black v. Marshall*, 497 F. Supp. 1088, 1100 (D. Hawaii 1980). The court in *E.E. Black* underscored the importance of a presumption of common usage of the discriminatory criteria. *Id.* Otherwise, according to the court, an employer using the "aberrational type of job qualification . . . would be rewarded if his reason for rejecting the applicant were ridiculous enough." *Id.*

them from all pilot jobs at United the court concludes that this rejection is not sufficient to demonstrate rejection from a "class of jobs," which would include not only global airlines, such as United, but all other types of carriers as well (national, commuter, regional, cargo/courier airlines). However, the court gives absolutely no indication as to how plaintiffs are to demonstrate whether or not United regarded them as able or unable to work for the other types of airlines. The court simply states that it cannot adopt a "reasoning [that] would imply that anyone who failed to obtain a single job because of a single requirement of employment could become a "disabled individual . . . This reading would stand the Act on its head." *Sutton* at 905.

As the Sixth Circuit stated in *Taylor v. United States Postal Service*, 946 F.2d 1214, 1218 (6th Cir. 1991),

> . . . a per se rule that never permitted an unsuccessful job applicant to prove he was perceived as being handicapped by pointing to the fact that he did not possess a so-called job requirement due to physical impairment would likewise stand the Act on its head. How else would a person who, for example, had a cosmetic disfigurement ever prove that he was handicapped under the Act except by pointing to the fact that an employer did not hire him for that reason?

In most cases, the plaintiff will only know that the employer rejected him or her because of an impairment. Absent contrary evidence, the rejection from the job in question must be viewed as a perception that the plaintiff is unable to perform the class of jobs of which the particular job is a part. For example, if an employer rejects an applicant for a teaching job because of an impairment, the applicant is regarded as unable to teach. Plaintiffs' allegation that there is nothing unique about the United pilot jobs should suffice to establish that United regarded plaintiffs (or all those with

uncorrected vision of 20/100 or worse) as unable to perform the class of jobs of piloting.[48]

Moreover, since plaintiffs were rejected because of their *uncorrected* vision, United cannot claim that it did not regard them as substantially limited in seeing because they can wear glasses. It would be unfair to look at the "regarded as" prong with mitigating measures that the defendant refused to consider in the rejection.

The Tenth Circuit's results-oriented approach can perhaps be explained by the courts' fundamental misunderstanding of the significance of finding that plaintiffs were "regarded as" disabled under the ADA. Immediately after rejecting plaintiffs' "regarded as" claim, the court cited *Kelly v. Drexel University*, 94 F.3d 102, 109 (3d Cir. 1996) for the proposition that accepting plaintiffs' claim would mean that "anyone could establish a *prima facie* discrimination case merely by demonstrating some adverse action against the individual. . . . "

The fundamental misunderstanding revealed by this quote is the assumption that establishing *coverage* is sufficient to establish a *prima facie* case. As stated earlier, the coverage question is just the first prerequisite of a *prima facie* ADA case.[49] The plaintiff must also show that he or she is qualified to perform the essential functions of the job and that

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[48] The Tenth Circuit references the EEOC's example that "an individual who cannot be a commercial pilot because of a minor vision impairment, but who can be a commercial airline co-pilot or a pilot for a courier service, would not be substantially limited in the major life activity of working," 29 C.F.R. §1630, app. §1630.2(j) para. 12. This example is used to explain whether, under the first prong of the definition of disability, an individual is actually substantially limited in working. Again, as explained above, in a "regarded as" case the allegation that United rejected plaintiffs from all pilot positions with United must be interpreted to at least raise a factual issue that United regarded plaintiffs as unqualified for pilot jobs in general.

[49] *See infra.*

the rejection was based on disability. As the Supreme Court warned in *Arline*, 480 U.S. at 285, by excluding an impaired individual from coverage, the individual loses the opportunity to have the condition evaluated in light of medical evidence, thus making him or her "vulnerable to discrimination on the basis of mythology – precisely the type of injury Congress sought to prevent."

Another insight into the Tenth Circuit's restrictive interpretation of coverage is revealed in the Court's statement that "[w]e refuse to construe the . . . The Act as a handout to those who are in fact capable of working in substantially similar jobs." *Sutton* at 906. *Citing Hileman v. City of Dallas*, 115 F.3d 352, 354 (5th Cir. 1997). Coverage under the ADA is not a hand-out. The fact that an individual *might* be able to find work elsewhere should not shield an employer from having its exclusionary medical criteria evaluated in light of objective medical evidence. As was emphasized time and time again in the legislative history of the ADA, "[b]y including the phrase 'qualified individual with a disability' the Committee intends to reaffirm that this legislation does not undermine an employer's ability to choose and maintain qualified workers. . . . " Senate Report at 26. "An employer may still devise physical and other job criteria and tests for a job so long as the criteria and tests are job related and consistent with business necessity." *Id.* at 27.

ADA plaintiffs want to work; they want to be tax-paying, contributing members of our society. Courts are accustomed to the term "disability" meaning "inability" in cases for benefits and tort awards. The ADA provides a new framework for the term disability. The third prong of the definition, in particular, is causing confusion because it uses the term "disabled" to describe people whose biggest limitation is the attitudes of others. *Amici*, current and former members of Congress, look to this Court to set forth the proper analytical framework for the lower courts, to give effect to Congressional intent to eliminate attitudinal barriers which limit the

opportunities of millions of Americans with a wide range of medical conditions.

CONCLUSION

For the foregoing reasons, the judgments of the Court of Appeals for the Tenth Circuit should be reversed and the judgment of the Court of Appeals for the Ninth Circuit affirmed.

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Respectfully submitted,

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